

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

78-311
No. _____

DAVID RONZELL JOHNSON - - Petitioner

v.

**HENRY MEIGS, JUDGE,
FRANKLIN CIRCUIT COURT
COMMONWEALTH OF KENTUCKY Respondent**

**PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY**

**WILLIAM E. JOHNSON
MICHAEL L. JUDY
Johnson, Judy & Gaines
326 West Main Street
Frankfort, Kentucky 40601**

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The petitioner, David Ronzell Johnson, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Kentucky entered on May 2, 1978.

ORDER BELOW

The order of the Supreme Court of Kentucky affirming the Kentucky Court of Appeals' denial of the petitioner's plea for a Writ of Prohibition without a

hearing on the merits was entered on May 2, 1978. (Appendix, hereinafter App., p. 1a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Whether the constitutional provisions of double jeopardy and the principles of res judicata and collateral estoppel serve to bar the petitioner's trial on the charge of robbery where he has previously been tried and acquitted on a charge of robbery-murder arising out of the same circumstances.

II. Whether a writ of prohibition is an appropriate remedy where a valid claim for double jeopardy is made and was it therefore error for the Supreme Court of Kentucky to deny the petitioner's request for a writ of prohibition.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

"No person shall be held to answer for a capital or otherwise infamous crime, unless a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twiced put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty or property, without due

process of law; nor shall private property be taken for public use without just compensation."

United States Constitution, Fourteenth Amendment, § One:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within his jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. NATURE OF THE CASE.

This is a petition for a writ of certiorari to the Supreme Court of Kentucky to review a judgment and order wherein that Court affirmed the judgment of the Kentucky Court of Appeals denying the petitioner's application for a writ of prohibition to prevent further proceedings against him on the grounds that his acquittal of the charge of robbery-murder on November 7, 1977 bars any subsequent trial or conviction of robbery which arose out of the same circumstances.

II. DECISION OF THE COURTS BELOW.

On May 2, 1978, the Supreme Court of Kentucky affirmed a prior judgment of the Kentucky Court of Appeals denying the petitioner's writ of prohibition. The net effect of this ruling would permit the Com-

monwealth of Kentucky to again attempt to try the petitioner upon a charge of aiding, counselling or attempting to aid another person in the commission of an offense of robbery, irrespective of the petitioner's previous acquittal upon the charge of aiding, counselling or attempting to aid another person committing the offense of robbery-murder arising out of the same incident. The Supreme Court of Kentucky ruled that the jury's verdict of not guilty of robbery-murder did not render any binding decision or finding upon the robbery count. Under the circumstances of this case, the Supreme Court held that the double jeopardy clause does not prevent a retrial of the robbery count after there was a declaration of a mistrial upon the robbery charge when it was first tried.

The order of the Kentucky Court of Appeals which was affirmed by the Supreme Court was an Order Denying Motion For Writ Of Prohibition which was entered on February 23, 1978. (App. p. 3a). The Court of Appeals of Kentucky provided no basis for its denial of the writ of prohibition, other than to indicate in its order that it was sufficiently advised.

The petitioner's appeal to the Kentucky Court of Appeals was initiated after the respondent, Judge Henry Meigs, Circuit Judge of the 48th Judicial District in the Commonwealth of Kentucky, entered an order on the 19th day of December, 1977 which overruled and denied the petitioner's motion to dismiss Count IV (aiding, counseling and attempting to aide in first degree robbery) of Indictment 7930 which was returned by a Grand Jury in Franklin County on the 2nd day of May, 1977. (App. 4a-7a). The indictment charged a co-defendant, Dwight Hubert Davis, with

the offense of robbery in the first degree in Count I and the offense of robbery-murder in Count II. The petitioner, David Ronzell Johnson, was charged in Count III with the offense of aiding, counselling or attempting to aid Dwight Hubert Davis in committing the offense of robbery-murder. Further, the petitioner was charged in Count IV with aiding, counselling or attempting to aide Dwight Hubert Davis in committing the offense of robbery in the first degree. A copy of the applicable Kentucky Statutes is set forth in the appendix. (App. p. 8a-10a). The co-defendant, Dwight Hubert Davis, pled guilty to the charges contained in the indictment prior to the trial of this action.

A trial was held on November 7, 1977 in the Franklin Circuit Court, Frankfort, Kentucky. Henry Meigs, Circuit Judge, presided. Following the presentation of evidence, arguments of counsel and instructions on the law of the case, the jury returned a verdict of not guilty upon the charge of aiding, counselling or attempting to aide in the commission of the robbery-murder (Count III). The jury further announced that they could not agree upon a verdict concerning the charge of aiding, counselling or attempting to aide in the commission of first degree robbery (Count IV). Therefore, the Court dismissed Count III of the indictment and declared a mistrial as to Count IV of the indictment. (App. p. 11a-13a).

The day following the entry of the trial order and judgment, the petitioner filed his motion to dismiss Count IV of the indictment upon the grounds that the jury verdict of not guilty concerning the robbery-mur-

der necessitated a dismissal of the charge of first degree robbery. (App. p. 14a-16a). This motion was subsequently overruled and denied by the Franklin Circuit Court Judge and the matter was assigned for trial upon a day certain. (App. p. 17a). Subsequent thereto, continuances have been granted until an order has been recently entered assigning this cause for trial by jury on Tuesday, July 18, 1978 at the hour of 10:00 a.m. (App. p. 18a).

III. COURSE OF THE PROCEEDING.

On April 22, 1977, the co-defendant, Dwight Hubert Davis, robbed Long John Silvers Seafood Shoppe which is located on the Versailles Road in Frankfort, Franklin County, Kentucky. During the course of this robbery, Dwight Hubert Davis shot and killed Donald Botts, an employee who was working on the premises after the restaurant had closed for the evening. Shortly after the commission of these acts, the co-defendant, Dwight Hubert Davis, was stopped in Franklin County, Kentucky by law enforcement officials in the vehicle of the petitioner, David Ronzell Johnson. The petitioner, David Ronzell Johnson, freely and voluntarily advised the city of Frankfort police officials of each event which had taken place earlier in the evening concerning the robbery and shooting at Long John Silvers. The petitioner assisted the law enforcement officials in recovering valuable items of evidence which were needed to arrest Dwight Hubert Davis.

After he had assisted the law enforcement officials, the petitioner was arrested for aiding, counselling and attempting to aide Dwight Hubert Davis in the robbery of the Long John Silvers Seafood Restaurant

and the murder of its employee, Donald Botts.

Thereafter, the petitioner was jointly indicted with Dwight Hubert Davis for the robbery of the Long John Silvers Seafood Restaurant and the murder of Donald Botts. The co-defendant Davis, who had entered the premises without the petitioner and who robbed the restaurant and killed the employee was indicted for capital murder and for robbery in the first degree. Prior to the trial, Dwight Hubert Davis entered a plea of guilty to the murder and robbery charges.

At the trial, there was no evidence that the petitioner, David Ronzell Johnson, entered the restaurant. He was indicted in Counts III and IV of the indictment of aiding, counseling and attempting to aide in the robbery-murder and first degree robbery. In both counts it was alleged that Dwight Hubert Davis, during the course of the robbery, caused the death of Donald Botts. The evidence at the trial substantiated that Davis killed Donald Botts during the course of his robbery of the Long John Silvers Seafood Shoppe.

It was undisputed that the petitioner, David Ronzell Johnson, worked at Long John Silver's Seafood Shoppe, while attending Kentucky State University. It was undisputed that Dwight Hubert Davis was a roommate of David Ronzell Johnson. The evidence also indicated that Dwight Hubert Davis had been assigned to room with the petitioner. Further, Dwight Hubert Davis had a criminal record which was unknown to the petitioner. The record further clearly indicates that Dwight Hubert Davis had been assigned to room with the petitioner. The record further clearly indicates that Dwight Hubert Davis had

requested that the petitioner take him to Long John Silvers Seafood Shoppe in order that Davis could obtain an application for employment at the restaurant. On the evening of the robbery and murder, the petitioner drove Dwight Hubert Davis to Long John Silvers Seafood Shoppe. The petitioner waited in his vehicle while Dwight Hubert Davis went into the restaurant to obtain the employment application. Instead of securing an employment application, Dwight Hubert Davis pulled out a concealed weapon after he had entered the premises and proceeded to rob the restaurant of proceeds which had been made during the day. It was during the course of this robbery that Donald Botts, an employee and assistant manager, was shot and killed.

There was a dispute in the evidence as to whether the petitioner knew that Dwight Hubert Davis intended to rob the premises. The petitioner testified that Davis had requested that the petitioner take him to Long John Silvers Seafood Shoppe to secure an application for employment. He testified that he did not know that Dwight Hubert Davis intended to rob the premises or that he had a weapon on his person. The petitioner testified it was not until Dwight Hubert Davis returned from the restaurant and demanded that the petitioner drive him away that he became frightened and realized what Dwight Hubert Davis had done.

Prior to the trial of this action, the petitioner's counsel moved the Court to require the Commonwealth to elect whether the appellant would be tried under Count III or Count IV of the indictment. This motion

was overruled and the case proceeded to trial on both counts. As indicated, Dwight Hubert Davis pled guilty to Counts I and II of the indictment prior to the trial.

The petitioner renewed his motion to dismiss the counts of the indictment at the conclusion of the Commonwealth's case and at the conclusion of the presentation of his evidence. These motions were overruled. The petitioner objected to both counts being submitted to the jury and to the Court's instruction to the jury on both counts. These motions and objections were overruled. Following its deliberation, the jury returned a not guilty verdict as to the charges contained in Count III (robbery-murder) but could not agree as to a verdict on the charges contained in Count IV (first degree robbery).

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTIONAL PROVISION OF DOUBLE JEOPARDY AND THE PRINCIPLES OF RES JUDICATA AND COLLATERAL ESTOPPEL SERVE TO BAR THE PETITIONER'S SECOND TRIAL ON THE CHARGE OF ROBBERY WHERE HE HAS PREVIOUSLY BEEN TRIED AND ACQUITTED ON A CHARGE OF ROBBERY-MURDER ARISING OUT OF THE SAME CIRCUMSTANCES.

The constitutional provisions of the Fifth Amendment to the Constitution of the United States of America as made applicable to the states by the Fourteenth Amendment provide the protection to each individual from twice being placed in jeopardy for the same offense. The evolution of this principle through the landmarked cases of *Ashe v. Swenson*, 397 US 436, 25 L Ed 2d, 90 S Ct 1189 (1970) to *Brown v. Ohio*, US, 53 L Ed 2d 187, 97 S. Ct. (1977) and *Harris v. Oklahoma*, US, 53 L Ed 2d 1054,

97 S. Ct. (1977), clearly demonstrates that any future attempt to try and convict the petitioner on the charge of first degree robbery is a violation of his constitutional rights.

In addition, Kentucky Statutory Law as set forth in KRS 505.040(2) also gives support to the proposition that the petitioner's acquittal on the robbery-murder charge bars any subsequent trial or conviction of the first degree robbery charges arising out of the same circumstances. That section reads as follows:

"Although a prosecution is for a violation of a different statutory provision from a former prosecution or for a violation of the same provision but based on different facts, it is barred by the former prosecution under the following circumstances:

(2) The former prosecution was terminated by a final order or judgment which has not subsequently been set aside and which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution; . . ."

In the commentary following this section, the following applicable example is given:

"As an example as how this would work, we may take the case of an injury caused by allegedly reckless driving by D. Suppose that D is first charged with reckless driving, and the case results in an explicit determination that, under all the circumstances, D was not reckless. If he is later charged with manslaughter, which requires proof of recklessness, he would be entitled to an acquittal."

Thus, in order for the petitioner to be convicted of robbery in the first degree, every element necessary to establish robbery-murder would have to be proven; i.e. voluntary participation, aiding, counseling, or attempting to aide; that a robbery occurred and that physical force was used upon Donald Botts by shooting him. Thus, there is no inconsistent fact between the robbery-murder charge and the first degree robbery charge.

The landmarked cases aforementioned dealt directly with and are dispositive of the issue at hand. In *Ashe v. Swenson*, supra, six men were engaged in a poker game which was robbed by three or four gunmen. The defendant was charged with robbery of one of the players. At his trial, he was acquitted. Six weeks later he was tried for the robbery of another player and convicted. The Supreme Court of Missouri affirmed the conviction, holding that a plea of former jeopardy must be denied. A collateral attack upon the conviction in the state court four years later was also unsuccessful. A habeas corpus proceeding then reached this Court. It was held by this Court that since the single rationally conceivable issue in dispute before the jury was whether the defendant was one of the robbers, the federal rule of collateral estoppel, which is embodied in the Fifth Amendment's guaranty against double jeopardy, made the second trial wholly impermissible.

Next, this Court considered the issue in *Harris v. Washington*, 404 US 55, 30 L Ed 2d 212, 92 S Ct 183 (1971). There, the defendant was tried in a Washington State Court for the murder of one of two persons

killed by the explosion of a bomb which had been sent through the mail. He was acquitted of the charge. The state then subsequently prosecuted the defendant for the murder of the other person and for assault of another person injured by the bomb. After granting certiorari, this Court held that collateral estoppel in criminal trials was an integral part of the constitutional guaranty against double jeopardy and that this constitutional guaranty applied in the present case, irrespective of whether the jury considered all relative evidence, and irrespective of the good faith of the state in bringing successive prosecutions.

This Court considered a very similar case to this one on application for a writ when it considered *Turner v. State of Arkansas*, 407 US 366, 32 L Ed 2d 798, 92 S Ct 2096 (1972). There, the petitioner was charged with "unlawfully, willfully, feloniously and violently" taking from an individual a sum of money, while the individual had been a participant in a poker game and then murdering the individual. The petitioner was found not guilty of the charge of murder. He was then indicted for robbery of the same decedent. His attempts in the state court to dismiss the second indictment were unsuccessful. On Certiorari, this Court reversed and remanded the case. It was held that this issue was controlled by *Ashe v. Swenson*, and that the double jeopardy clause of the Fifth Amendment prevented the petitioner's retrial. This Court, at pages 801-802 of the Lawyer's Edition Volume, stated:

"... the state has stipulated that the robbery and murder arose out of 'the same set of facts, circumstances, and the same occasion.' The crucial question, therefore is what issues a general ver-

dict of acquittal at the murder trial resolve. The jury was instructed that it must find petitioner guilty of first degree murder if it found that he had killed the decedent Yates either with premeditation or unintentionally during the course of a robbery. The jury's verdict thus necessarily means that it found petitioner not guilty of the killing. The State's theory, however, is that the jury might have believed that petitioner and his brother robbed Yates but that his brother actually committed the murder. This theory is belied by the actual instructions given the jury. Had the jury found petitioner present at the crime scene, it would have been obligated to return a verdict of guilty of murder even if it believed that he had not actually pulled the trigger..."

Applying this case to the issue presented in this petition for a writ of certiorari, we have the following resolution. Had the jury believed that David Ronzell Johnson, with the intention of promoting or facilitating the robbery, aided, counseled or attempted to aide Dwight Hubert Davis, it would have been obligated to return a verdict of robbery-murder under Instruction No. 1 which was given at the trial of this action. Therefore, since the jury found David Ronzell Johnson not guilty of murder during the course of the robbery, it follows that the petitioner cannot be tried again under the same set of facts and circumstances for robbery in the first degree.

The petitioner contends that both the Kentucky Court of Appeals and the Supreme Court of Kentucky failed to properly apply the standards set forth by this Court in *Brown v. Ohio*, supra, and *Harris v. Okla-*

homa, supra. In *Brown v. Ohio*, the defendant Brown was arrested nine days after he had stolen an automobile. He pled guilty to a misdemeanor charge of joyriding. Thereafter, he was charged with the felony auto theft based upon his original taking of the automobile. The trial court rejected the defendant's plea of double jeopardy. Thus, the defendant entered a guilty plea and appealed. The Ohio Court of Appeals affirmed stating that the two prosecutions were based on separate acts and thus the double jeopardy clause did not bar the second prosecution.

This Court reversed the Ohio Courts on this matter. In discussing the double jeopardy clause, this Court noted at page 194 of the Lawyers' Edition Volume as follows:

"The double jeopardy clause 'protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' "

The prosecution in this case, as in the *Brown* case, contends that robbery-murder and first degree robbery are different prosecutions and that being distinguishable, an acquittal on the one does not bar conviction on the other. However, the fact that they have different names, statute numbers or penalties does not necessarily distinguish them when viewed in light of the double jeopardy clause. In *Brown*, this Court applied the established *Blockburger* test:

"The applicable rule is that where the same act or transaction constitutes a violation of two distinct

statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . "

Thus, if the elements of the second charge are the same as those litigated in the first charge, the disposition of the first charge necessarily bars the successive prosecution. In *Brown*, this Court found that the elements found in joyriding required no proof beyond that which is required for conviction of the greater offense of auto theft. This Court continued at page 196:

"The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it.

"This conclusion merely restates what has been this court's understanding of the . . . rule that . . .

"where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense."

In applying these principles to this petition, the elements necessary to establish first degree robbery had previously been litigated in the charge of robbery-murder. These elements having been resolved in the petitioner's favor, they cannot be relitigated as an included crime (first degree robbery) without twice placing the petitioner in jeopardy for the same offense.

In *Harris v. Oklahoma*, supra, the defendant Harris was first convicted of a felony murder arising out

of an armed robbery. Subsequently, he was tried and convicted on a separate charge of robbery with a firearm. In reversing the conviction, this court noted at page 1056 in the Lawyers' Edition Volume:

"When as here, conviction for a greater crime, murder, cannot be had without conviction for the lesser crime, robbery with firearms, the double jeopardy clause bars prosecutions for the lesser crime after conviction for the greater one. (cases cited) . . . (A) person (who) has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." (cases cited)."

Similarly, the petitioner herein who has been tried and acquitted for the crime of murder-robbery cannot be tried a second time for the incidental crime of robbery in the first degree. This is because the elements which are necessary to establish the basis of a conviction of the robbery charge have already been resolved in favor of the petitioner at the time he was acquitted of the charge of robbery-murder. Therefore, his acquittal of the robbery-murder charge bars by double jeopardy the subsequent trial of first degree robbery since the same arose out of the same circumstance and event.

The failure of the Supreme Court of Kentucky and the Kentucky Court of Appeals to adhere to this court's development of the constitutional provision relative to double jeopardy requires that a writ of certiorari be issued commanding that the matter be reviewed by this Court.

II. A WRIT OF PROHIBITION IS AN APPROPRIATE REMEDY WHERE A VALID CLAIM FOR DOUBLE JEOPARDY IS MADE AND IT WAS A SUBSTANTIAL ERROR FOR THE SUPREME COURT OF KENTUCKY TO DENY THE PETITIONER'S REQUEST FOR A WRIT OF PROHIBITION.

The petitioner herein contends that where the trial court, the Kentucky Court of Appeals and the Supreme Court of Kentucky failed to recognize that there is a valid claim of double jeopardy in this proceeding, it is incumbent upon this court to issue a writ of certiorari to consider whether a writ of prohibition should be ordered to prevent this matter from being further litigated.

It is well recognized and even the trend in most jurisdiction that a writ of prohibition is a proper remedy where a constitutional claim of double jeopardy is validly made. *Cardenas v. Superior Court of Los Angeles County*, (1961), 56 Cal. 2d 273, 14 Cal. 2d 273, 14 Cal. Rytr. 657, 363 P. 2d 889, 100 ALR 2d 371; *Markiewicz v. Black*, (1958), 139 Colo. 128, 330 P. 2d 539, 75 ALR 2d 678; *State ex rel. Williams v. Grayson* (Fla., 1956) 890 So 2d 710, 63 ALR 2d 777; *State ex rel. Zirk v. Muntzing*, (1961) 146 W.Va. 878, 122 SE 2d 851, 94 ALR 2d 1033; *McCabe v. Bronx County Court* (1960) 24 Misc 2d 472, 199 NYS 2d 241; *Mack v. Court of General Sessions* (1961) 14 App. Div. 2d 98, 217 NYS 2d, 423; *Allen v. City Court of Ithaca* (1962) 33 Misc 2d 356, 224 NYS 2d 1018; *Curry v. Supreme Court*, (1970) 2 Cal. 3d 707, 87 Cal. Rptr. 361, 470 P. 2d 345; *Richard M. v. Superior Court*, (1971) 4 Cal. 3d 370, 93 Cal. Rptr. 752, 482 P. 2d 664; *State ex rel James v. Williams*, (Fla. App. 1964) 164 So. 2d 873; *State ex rel Hand v. Lane* (Fla. App. 1968) 209 So. 2d 873; *State*

v. Harris, (1970) 2 Wash 272, 469 P. 2d 937, *State ex rel. Anderberg v. Strawn* (Fla. App. 1975) 307 So 2d 213, quashed (Fla) 332 So. 2d 601; *Tuite v. Shaw* 49 (1975) 49 App. div. 2d 737, 372 NYS 2d 219; *Weaver v. Schaaf* (Mo. 1975) 520 SW 2d 58.

The constitutional grant of freedom from double jeopardy is an assertion of immunity which when validly raised terminates even the risk of a second trial. To permit the trial court to proceed to try the petitioner a second time under a valid plea of double jeopardy would be to permit the trial court to exceed and abuse its jurisdiction.

The constitutional guaranty against double jeopardy is so important that it represents something more than a "defense" to a criminal prosecution. As the Court in *McCabe*, supra, noted at page 245 in the New York Supplement:

"The plea of double jeopardy is not a defense in the ordinary sense. For a defense such as alibi, self-defense, lack of intent, etc., is aimed at establishing the defendant's innocence of the crime charged and of necessity must be proffered at the trial; whereas the plea of double jeopardy . . . is an assertion of a constitutional grant of immunity. Therefore, it is more than a defense. The act which terminates the first trial germinates into life the dormant seed of constitutional immunity . . . The guarantee is that the person shall not be subject to the risk of a second trial. Nor may this protection be abridged or curtailed by holding that a defendant may assert it during any stage of the new trial. The immunity protects him against

being subjected to another trial — any part of another trial. There is jeopardy so long as the indictment with the same charge is outstanding and pending. Therefore, reason and logic indicates that it is permissible to raise the plea of double jeopardy, if a person chooses, before the commencement of another trial and in whatever forum is proper and available."

Thus, if the double jeopardy guarantee is that a person shall not be subject to the risk of a second trial, then the trial court is without jurisdiction to try the movant upon the charge of robbery in the first degree. Therefore, if the trial court has no jurisdiction, a writ of prohibition will lie. *Murphy v. Thomas*, Ky., 296 S W2d 469 (1956); *City of Lexington v. Cox*, Ky., 481 SW 2d 645 (1972).

The prosecution contends that David Ronzell Johnson has an adequate remedy by appeal. The mere fact that there is a remedy by appeal available does not preclude the issuance of a writ of prohibition. *Brougher v. Allen*, Ky., 462 SW 2d 187 (1970). The criteria is whether in light of the facts of the case the remedy through appeal is adequate.

In a criminal case involving the petition of a twenty year old man for the protection of his constitutional guarantees of double jeopardy, res judicata and collateral estoppel, the remedy of waiting for an appeal is not adequate. The petitioner, a hardworking, young black man without any previous felony record is entitled to a better and quicker resolution of this matter. To permit a second trial herein before deciding whether the trial court even has jurisdiction,

would subject the petitioner unnecessarily to a delay in his freedom from the confines of the charges of the indictment. It would unnecessarily necessitate his expending substantial sums to prepare for and to present his defense. It would unnecessarily subject him to the emotional strain and trauma he has once endured. It would unnecessarily expose him to the risk of imprisonment between trial and appeal decision. It would unnecessarily cause him to wait for a final resolution of this matter until an appeal can be perfected, briefed, argued and decided. As the Court noted in *Jackson v. Superior Court of San Diego County*, (1937) 10 Cal. 2d 350, 74 P. 2d 243, at page 245.

"... while the remedy at law is plain, it is neither speedy nor adequate ... in view of the fact that in its final analysis the question before us is one of jurisdiction of the respondents to again place petitioners on trial for the offenses charged in the indictment found against them."

Similarly, the administration of justice and the protection of constitutional guarantees proscribes that the questioned double jeopardy — jurisdiction be resolved by this Court prior to the second trial of the movant.

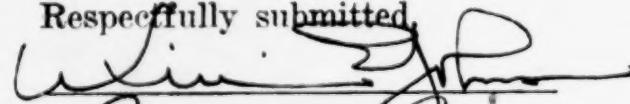
CONCLUSION

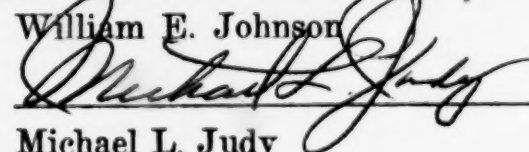
The petitioner's acquittal at the first trial of the charge of robbery-murder bars any subsequent trial or conviction of robbery in the first degree growing out of the same circumstances. The subsequent attempt to try this petitioner upon the charge of first degree robbery is barred by the constitutional protection of double jeopardy and the principles of *res judicata* and col-

lateral estoppel. A writ of prohibition is the proper remedy to bar this unconstitutional attempt to try the petitioner again on the charge of first degree robbery. The Supreme Court of Kentucky, Kentucky Court of Appeals and Trial Court having failed to recognize the true application of the principles discussed herein, it is therefore necessary for this court to review the decisions of the highest court in this Commonwealth and to issue a Writ of Certiorari to the Supreme Court of Kentucky. If the decision of the Supreme Court of Kentucky is permitted to stand, the provisions and applications of the principles of double jeopardy, *res judicata* and collateral estoppel will not be fairly applied within the Commonwealth of Kentucky and the administration of justice will not be properly dispensed to the petitioner in this instance.

The petitioner prays that this honorable court grant a review of this matter.

Respectfully submitted,

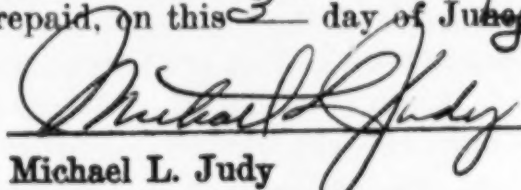

William E. Johnson


Michael L. Judy

Johnson, Judy & Gaines
Attorneys at Law
326 West Main Street
Frankfort, Kentucky 40601
Attorneys for Petitioner

PROOF OF SERVICE

I, Michael L. Judy, counsel for the petitioner herein, hereby certifies that three copies of the foregoing brief were mailed, postage prepaid, to Hon. Henry Meigs, Judge, Franklin Circuit Court, the respondent herein, and to his counsel, Hon. Ray Corns, Commonwealth Attorney, Bridge Street, Frankfort, Kentucky, postage prepaid, on this 3 day of ~~July~~ 1978.


Michael L. Judy
Co-counsel for Petitioner

APPENDIX

RENDERED: May 2, 1978

SUPREME COURT OF KENTUCKY

78-SC-179-MR

DAVID RONZELL JOHNSON - - Appellant

V. APPEAL FROM THE COURT OF APPEALS
OF KENTUCKY—78-CA-27-0A

HENRY MEIGS, JUDGE,
FRANKLIN CIRCUIT COURT - - Appellee

**MEMORANDUM OPINION PER CURIAM
AFFIRMING**

An examination of the record discloses that the pin which exploded the balloon of the murder count was the dissatisfaction of at least some members of the jury with the proof of the wantonness of Johnson's conduct. The unanimity of the jury's verdict of not guilty of murder and their inability to agree on any verdict on the robbery count confirms that they made no valid and binding findings on any issues common to the murder and robbery counts. Under these circumstances the double jeopardy clause does not prevent a retrial of the robbery count after declaration of a mistrial. Cf. *Turner v. Arkansas*, 407 U.S. 366,

369 (1972); *Ashe v. Swenson*, 397 U.S. 436, 438, 440 n. 4 (1970); *Centers v. Commonwealth, Ky.*, 318 S.W. 2d 57 (1958).

The judgment of the Court of Appeals is affirmed.

All concur.

ATTORNEYS FOR APPELLANT:

William E. Johnson & Michael L. Judy
Johnson, Judy & Gaines
326 West Main Street
Frankfort, Kentucky 40601

ATTORNEY FOR APPELLEE:

Ray Corns
Commonwealth Attorney
Frankfort, Kentucky 40601

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 78-CA-27-0A

DAVID RONZELL JOHNSON - - Petitioner

V. ON PETITION FOR WRIT OF PROHIBITION

**HENRY MEIGS, JUDGE,
FRANKLIN CIRCUIT COURT - Respondent**

**ORDER DENYING MOTION FOR WRIT OF
PROHIBITION**

**BEFORE: MARTIN, Chief Judge, REYNOLDS and
WILHOIT, Judges**

The Court, having considered this original action styled Motion for Writ of Prohibition, and the response thereto, and being otherwise sufficiently advise, **ORDERS** that the motion be and is hereby **DENIED**.

ENTERED: February 23, 1978.

/s/ Boyce F. Martin

Judge, Court of Appeals

No. 7930

COMMONWEALTH OF KENTUCKY

INDICTMENT FOR

VS: DWIGHT HUBERT DAVIS

DAVID RONZELL JOHNSON

KRS 507.020 (1) (a) (b) (2) (b)

Capital Offense of Murder

515.020—Robbery in the First Degree

**502.020—Liability for Conduct of
Another, Complicity**

A TRUE BILL

/s/ Wm. B. Pickett

Foreman of the Grand Jury

Presented to the Franklin Circuit Court by the Foreman of the Grand Jury in the presence of the Grand Jury and filed in open Court this 2nd day of May, 1977.

/s/ James E. Collins

Clerk, Franklin Circuit Court

BY: _____, D.C.

Bond \$100,000

/s/ Ray Corns

**Commonwealth Attorney
48th Judicial District**

FRANKLIN CIRCUIT COURT

COMMONWEALTH OF KENTUCKY

VS: NO. 7930

DWIGHT HUBERT DAVIS

DAVID RONZELL JOHNSON - - Defendant

KRS 507.020 (1) (a) (b) (2) (b)—Capital

15.020—Class A Felony

502.020—Class B Felony

The Grand Jury charges:

COUNT I

On or about the 22nd day of April, 1977, in Franklin County, Kentucky,

the above named defendant, Dwight Hubert Davis, did commit the capital offense of murder when, during the commission of the offense of robbery in the first degree, he intentionally caused the death of Donald Botts by shooting him with a pistol at Long John Silvers Seafood Shoppe, 166 Versailles Road, Frankfort, Kentucky.

COUNT II

On or about the 22nd day of April, 1977, in Franklin County, Kentucky, the above named defendant, Dwight Hubert Davis, did commit the offense of robbery in the first degree when, in the course of committing theft at Long John Silvers Seafood Shoppe, 166 Versailles Road, Frankfort, Kentucky, and which armed with a deadly weapon, he used physical force

upon another person with intent to accomplish the theft, thereby causing physical injury and death to Donald Botts.

COUNT III

On or about the 22nd day of April, 1977, in Franklin County, Kentucky, the above name defendant, David Ronzell Johnson, with the intention of promoting or facilitating the commission of the offense of robbery in the first degree, did commit the offense of robbery-murder by aiding, counselling, or attempting to aid another person, Dwight Hubert Davis, in committing the offense of robbery-murder, when under circumstances manifesting extreme indifference to human life, he wantonly engaged in conduct which created a grave risk of death to another person and *thereby caused the death of Donald Botts* at Long John Silvers Seafood Shoppe, 166 Versailles Road, Frankfort, Kentucky,

COUNT IV

On or about the 22nd day of April, 1977, in Franklin County, Kentucky, the above named defendant, David Ronzell Johnson, with the intention of promoting or facilitating the commission of the offense of robbery in the first degree, did commit the offense of robbery in the first degree by aiding, counselling, or attempting to aid another person, Dwight Hubert Davis, in committing the offense of robbery in the first degree, when in the course of committing theft at Long John Silvers Seafood Shoppe, 166 Versailles Road, Frankfort, Kentucky, the other person, Dwight Hubert Davis, while armed with a deadly weapon used physi-

cal force with intent to accomplish the theft, *thereby causing physical injury and death to Donald Botts.*

against the peace and dignity of the Commonwealth of Kentucky.

A TRUE BILL

/s/ Wm. B. Pickett

Foreman of the Grand Jury

WITNESSES: Detective Robert Courtney, Frankfort, Police Department, Frankfort, Kentucky.

KENTUCKY REVISED STATUTES

Sec. 507.020 Murder

"(1) A person is guilty of murder when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime; or

(b) Under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death of another person.

(2) Murder is a Class A felony, except that in the following situations it is a capital offense:

(a) The defendant's act of killing was intentional and was for profit or hire;

(b) The defendant's act of killing was intentional, and occurred during the commission of arson in the first degree, robbery in the first degree, burglary in the first degree, or rape in the first degree;

(c) The defendant's act of killing was intentional and the defendant was a prisoner and the vic-

tim was a prison employe engaged at the time of the act in the performance of his duties;

(d) The defendant's act of killing was intentional and the death was caused through use of a destructive device, as defined in KRS 237.030(1);

(e) The defendant's act or acts of killing were intentional and they resulted in multiple deaths; or

(f) The defendant's act of killing was intentional and the victim was a police officer, sheriff or deputy sheriff engaged at the time of the act in the lawful performance of his duties."

KENTUCKY REVISED STATUTES

Sec. 502.020 Liability for conduct of another; complicity

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

(c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

(2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

(a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or

(b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or

(c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

KENTUCKY REVISED STATUTES

Sec. 515.020 Robbery in the first degree

(1) A person is guilty of robbery in the first degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft and when he:

(a) Causes physical injury to any person who is not a participant in the crime; or

(b) Is armed with a deadly weapon; or

(c) Uses or threatens the immediate use of a dangerous instrument upon any person who is not a participant in the crime.

(2) Robbery in the first degree is a Class B felony.

FRANKLIN CIRCUIT COURT

INDICTMENT NO. 7930

COMMONWEALTH OF KENTUCKY - Plaintiff

VS. TRIAL ORDER AND JUDGMENT

DAVID RONZELL JOHNSON - Defendant

This action came on for trial on November 7, 1977. The Commonwealth and the defendant announced ready. Thereupon, the Court proceeded with the selection of a jury. The following jury was impanelled to try the case according to the law and the evidence:

George Smith	Edward Newton	James Dempsey
Ella Thomas	David Noble	Shirley Norfleet
Frances Anglin	Bobbie Pierce	Billy Hampton
Mary Hungate	Joe Amodor	Doug Baldwin

The Commonwealth Attorney made an opening statement and this was followed by the opening statement of the attorney for the defendant.

The Commonwealth then proceeded to the introduction of testimony and exhibits. The Commonwealth announced closed and the defendant, by counsel, made a motion for a directed verdict of acquittal and for the dismissal of the Indictment. This motion was overruled.

The defendant introduced testimony through witnesses on his behalf. The defendant announced closed. The defendant then renewed his motion for a directed

verdict of acquittal and for a dismissal of the Indictment. This motion was overruled.

The defendant tendered certain instructions which were marked and refused. The defendant further objected to the instructions given and stated his objections to the reporter. The Court then instructed the jury as to the law of the case. The attorney for the defendant then argued the case to the jury and this was followed by argument of the Commonwealth Attorney.

The jury then retired to the jury room to deliberate the verdict:

"We the jury, find the defendant not guilty under Instruction No. 1.

/s/ Billy Hampton

Foreman

The jury further announced that they could not agree upon a verdict under Instruction No. 2.

The Court accepted the verdict and orally stated that the count in the indictment referred to in Instruction No. 2.

It is therefore ordered and adjudged as follows:

1. That Count III in Indictment No. 7930 is hereby dismissed, with prejudice, pursuant to the jury verdict of not guilty.

2. That a mistrial is hereby declared as to Count IV in Indictment No. 7930 by reason of the failure of the jury to be able to agree upon a verdict as to that

Count.

3. It is further ordered that the charge set out in Count IV of said Indictment is assigned for trial on March 13, 1978.

4. On motion of the defendant, the defendant's bond is hereby reduced to the sum of \$20,000.00.

This 14th day of November, 1977.

/s/ Henry Meigs

Judge, Franklin Circuit Court

HAVE SEEN:

/s/ Ray Corns

Commonwealth Attorney

/s/ William Johnson

Attorney for Defendant

FRANKLIN CIRCUIT COURT

CRIMINAL INDICTMENT NO. 7930

COMMONWEALTH OF KENTUCKY - Plaintiff

VS. NOTICE, MOTION, ORDER

DAVID RONZELL JOHNSON - Defendant

You will kindly take notice hereby that the motion set forth below will be brought on for hearing at the next appointed motion hour of the Franklin Circuit Court falling not less than five days from the date hereof.

This 15th day of November, 1977.

SERVE:

Hon. Ray Corns
Commonwealth Attorney
Ole Y Complex
Bridge Street
Frankfort, Kentucky 40601

MOTION

Comes the defendant, by counsel, and moves the Court to dismiss Count IV of the Indictment for the reason that the jury verdict finding the defendant not guilty of the crime of murder necessitates a dismissal of the charge of robbery. The instructions as submitted to the jury required the jury to find that the defendant had voluntarily aided and assisted Dwight

Davis in planning and carrying out the robbery. In order to convict the defendant of murder, the jury had to find that the defendant had been guilty of wanton conduct. In order for the jury to convict the defendant of robbery, there must be a finding that he knew that Dwight Davis intended to use a deadly weapon. If he knew that Dwight Davis intended to use a deadly weapon in promoting and carrying out the robbery, then he would be guilty of murder if that weapon were used during the robbery. Since the jury found he was not guilty of the crime of murder, it must logically follow that he could not be found guilty of the crime of robbery. The issue is now res adjudicata.

JOHNSON, JUDY & GAINES

By: /s/ William E. Johnson

Attorneys for Defendant
326 West Main Street
Frankfort, Kentucky 40601

ORDER

The motion hereinabove, which was filed in the Office of the Clerk of the Franklin Circuit Court on the 15th day of November, 1977, is hereby assigned for hearing in the Court Room, Franklin County, Courthouse, 218 St. Clair Street, Frankfort, Kentucky, on the 5th day of December, 1977, at the hour of 9:00.

/s/ Henry Meigs

Judge, Franklin Circuit Court

The foregoing notice and motion was filed in my office on the 15th day of November, 1977, and one copy thereof together with the order assigning the hearing thereon was served by mail on the person and at the address designated in the notice this 15th day of November, 1977.

/s/ James E. Collins

Clerk, Franklin Circuit Court

FRANKLIN CIRCUIT COURT

INDICTMENT NO. 7930

COMMONWEALTH OF KENTUCKY - Plaintiff

VS: ORDER

DAVID RONZELL JOHNSON - Defendant

The defendant having moved the Court to dismiss Count IV in the Indictment for the reason that the jury verdict finding the defendant not guilty of aiding and abetting in the crime of murder necessitated a dismissal of the charge of aiding and abetting of an armed robbery and the same having come before the Court and the Court having heard argument of counsel and being fully advised, IT IS HEREBY ORDERED that said motion shall be and the same is hereby overruled, to which the defendant objects and excepts.

So ordered this 19th day of December, 1977.

/s/ Henry Meigs

Judge, Franklin Circuit Court
Division I

HAVE SEEN:

/s/ Ray Corns

Commonwealth Attorney

/s/ Michael L. Judy

Attorney for Defendant

17a

FRANKLIN CIRCUIT COURT

#7990

COMMONWEALTH OF KENTUCKY - Plaintiff

VS. ORDER

DAVID RONZELL JOHNSON - Defendant

On motion of counsel for Commonwealth, this cause is hereby assigned for trial at 10:00 A.M. Tuesday, July 18, 1978, in the Circuit Court Room.

/s/ Henry Meigs

Judge, Franklin Circuit Court

HAVE SEEN:

/s/ Ray Corns

Counsel for Plaintiff

/s/ William Johnson

Counsel for Defendant

AUG 14 1978

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. **78-31****DAVID JOHNSON** - - - - - **Petitioner***versus***HENRY MEIGS, Judge** - - - - - **Respondent**

On Writ of Certiorari to the Supreme Court of Kentucky

RESPONSE TO PETITION

ROBERT F STEPHENS*Attorney General***C. DAVID CLAUSS***Assistant Attorney General*

Capitol Building

Frankfort, Kentucky 40601

Counsel for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

DAVID JOHNSON - - - - - *Petitioner*

v.

HENRY MEIGS, Judge - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF KENTUCKY

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Kentucky was filed on May 2, 1978, in *Johnson v. Meigs, Ky.*, File No. 78-SC-179-MR. (See Appendix.)

QUESTIONS PRESENTED

Although Petitioner has posed two questions in the petition, Respondent believes that the Petition validly presents only one issue for the Court's consideration, to wit:

WHETHER THE DECISION OF THE SUPREME COURT OF KENTUCKY IN *JOHNSON v. MEIGS*, FILE NO. 78-SC-179-MR, IS CORRECT.

CONSTITUTIONAL PROVISIONS

Petitioner has sought to invoke the Fifth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT

Petitioner and Dwight Davis were indicted for armed robbery and for the murder of the robbery victim. Petitioner drove Davis to a restaurant where Davis stole a sum of money and shot and killed the manager of the restaurant. Davis then left the restaurant and made his escape in Petitioner's car. (Petitioner remained in the car during the robbery.) Petitioner was indicted under Kentucky's complicity statute, KRS 502.020. (See Appendix.)

Following Petitioner's trial by jury in the Franklin Circuit Court on November 7, 1977, the jury returned a verdict of not guilty on the charge of murder but could not agree upon a verdict on the charge of armed robbery. Thereupon the trial court dismissed the indictment to the extent of the murder charge and declared a mistrial as to the robbery charge.

Petitioner then moved, in the trial court, for dismissal of the robbery charge. Failing at this endeavor, Petitioner thereafter sought unsuccessfully a writ of prohibition in the Court of Appeals of Kentucky (*Johnson v. Meigs*, Ky. App., No. 78-CA-27-OA (Order entered February 23, 1978)) in order to prevent his being retried for the charge of armed robbery. (See Appendix.)

Petitioner's next step was to appeal the decision of the Court of Appeals of Kentucky to the Supreme Court of Kentucky, from where he prosecutes this application for writ of certiorari.

ARGUMENT

The Decision Below Is Correct.

Petitioner argues that the decision of the Supreme Court of Kentucky is incorrect because the decision is contrary to KRS 505.040 (see Appendix) and because the decision runs afoul of the Fifth and Fourteenth amendment protection against double jeopardy.

The provisions of KRS 505.040 do not apply to the instant proceeding. The cited statute applies to circumstances involving sequential prosecutions for different offenses. Because the second prosecution for robbery differs only from the murder portion of the first prosecution, the analysis of the applicability of KRS 505.040 must be confined to the murder aspects of the first trial and to the second trial for robbery alone.

Although the first trial, for the offense of murder, resulted in an acquittal, the offense of robbery is not an offense of which Petitioner might have been convicted insofar as the murder aspect of the first trial is concerned. (KRS 505.040(1)(a).) Neither will any other sub-section of KRS 505.040 entitle Petitioner to the relief sought.

The cases cited by Petitioner are distinguishable from the instant case and are therefore inapplicable.

In *Ashe v. Swenson*, 397 U. S. 436 (1970), six men were robbed at the same time by several gunmen. Ashe was charged with six counts of robbery. Following trial for the robbery of one victim Ashe was acquitted. He was thereafter tried for, and convicted of, the robbery of a second victim. On a subsequent collateral attack this Court held that the second trial violated Ashe's Fifth Amendment double jeopardy rights. Because of the nature of the case, the only fact which was ever really in issue was whether Ashe was one of the gunmen. When the jury acquitted Ashe at the first trial, the jury validly, and finally, determined that Ashe was not one of the gunmen and, coincidentally, that he could not have robbed any of the victims. The verdict at the first trial constituted a determination of every fact necessary to a decision in the second trial. Because every fact necessary to convict at the second trial had been litigated and had been validly and finally determined during the first trial, the Double Jeopardy Clause prevented re-litigation of those facts by the same parties. *Turner v. Arkansas*, 407 U. S. 366 (1972), and *Harris v. Washington*, 404 U. S. 55 (1971), are, similarly, distinguishable from the case at bar both in law and in fact.

In the case at bar the instructions of the trial court required a determination of three facts regarding the murder charge and three facts regarding the robbery charge. (See Appendix.) The two sets of facts are not identical.

To convict of murder the jury was required to believe all of the following facts:

1. That petitioner promoted or facilitated the robbery;
2. That the restaurant manager was killed; and,
3. That petitioner wantonly engaged in conduct which created a grave risk of death to another person.

To convict of robbery the jury was required to believe all of the following facts:

1. That Davis stole money from the restaurant;
2. That Davis shot the restaurant manager with a deadly weapon; and
3. That, intending to promote or facilitate the robbery, petitioner did counsel, aid, or attempt to aid Davis in the commission of the robbery.

One may not reasonably assume that the jury failed to believe that Davis, who pleaded guilty to murder and armed robbery, shot and killed the manager or that Davis stole money from the restaurant.

As to the facts necessary to prove robbery, as set out above, the jury must have believed numbers 1 and 2. Because the jury did not reach a verdict on the robbery charge, the jury must not have agreed on whether robbery fact 3, above, was proved.

As to the facts necessary to prove murder, as set out above, the jury must have believed only number 2. By virtue of the disagreement as to robbery fact 3, we are compelled to conclude that the jury was unable to agree upon murder fact 1. (The two are identical.) But, because the jury did agree that Petitioner was

not guilty of murder, the jury must have completely agreed that murder fact 3 was not proved; and we must conclude that it was only the failure of the prosecution to prove murder fact 3 which resulted in an acquittal on the murder charge, because of the jury's disagreement as to murder fact 1/robbery fact 3.

Although Petitioner's culpable intent and Petitioner's promoting of the robbery were litigated, the jury could not, yea could not, by virtue of the result of the trial, have determined the extent of the proof thereon. Thus, the Supreme Court of Kentucky was correct in its determination that re-litigation of whether Petitioner promoted, with the requisite intent, the robbery is not violative of Petitioner's rights.

Brown v. Ohio, 432 U. S. 161 (1977), is also distinguishable. There, following Brown's conviction for one offense, the prosecution sought to convict Brown of a lesser included offense, every fact of which lesser offense necessarily had been proved at the trial of the greater offense. This Court held that such a second trial was prohibited by the Double Jeopardy Clause. Citing *Blockburger v. U.S.*, 284 U. S. 299, 304 (1932), the Court wrote:

"The applicable rule is that where the same act . . . constitutes a violation of two distinct statutory provisions, the test to be applied . . . is whether each provision requires proof of a fact which the other does not. . . ."

Armed robbery is most certainly not a lesser included offense of murder; and, as seen by the instructions given to the jury at the trial of the case at bar,

the proof of each crime required the proof of a fact which proof of the other crime did not require. In the case at bar, conviction for murder required proof that Petitioner acted wantonly, while robbery had no such requirement; and conviction for robbery required proof that Davis stole money, while murder had no such requirement.

CONCLUSION

For the foregoing reasons Respondent respectfully submits that the Petition must be dismissed.

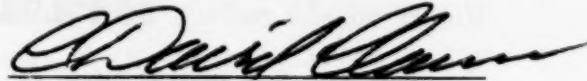
Respectfully submitted,

ROBERT F. STEPHENS
Attorney General

C. DAVID CLAUSS
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
Counsel for Respondent

PROOF OF SERVICE

I, C. David Clauss, counsel for Respondent, hereby certify that the foregoing Brief for Respondent was served on Petitioner by depositing three copies in the United States mail, first class postage prepaid, this 11th day of August, 1978, addressed to counsel for Petitioner, Honorable William E. Johnson and Honorable Michael L. Judy, Morehead House, 326 West Main Street, Frankfort, Kentucky 40601.



Assistant Attorney General

APPENDIX

RENDERED: MAY 2, 1978

SUPREME COURT OF KENTUCKY

78-SC-179-MR

DAVID RONZELL JOHNSON - - - Appellant

v.

HENRY MEIGS, Judge, Franklin Circuit Court - Appellee

Appeal from the Court of Appeals of Kentucky
78-CA-27-OA

**MEMORANDUM OPINION PER CURIAM—
AFFIRMING**

An examination of the record discloses that the pin which exploded the balloon of the murder count was the dissatisfaction of at least some members of the jury with the proof of the wantonness of Johnson's conduct. The unanimity of the jury's verdict of not guilty of murder and their inability to agree on any verdict on the robbery count confirms that they made no valid and binding findings on any issues common to the murder and robbery counts. Under these circumstances the double jeopardy clause does not prevent a retrial of the robbery count after declaration of a mistrial. Cf. *Turner v. Arkansas*, 407 U. S. 366, 369 (1972); *Ashe v. Swenson*, 397 U. S. 436, 438, 440 n. 4 (1970); *Centers v. Commonwealth, Ky.*, 318 S. W. 2d 57 (1958).

The judgment of the Court of Appeals is affirmed.

All concur.

ATTORNEYS FOR APPELLANT:

William E. Johnson & Michael L. Judy
 Johnson, Judy & Gaines
 326 West Main Street
 Frankfort, Kentucky 40601

ATTORNEY FOR APPELLEE:

Ray Corns
 Commonwealth Attorney
 Frankfort, Kentucky 40601

COURT OF APPEALS OF KENTUCKY

No. 78-CA-27-OA

 DAVID RONZELL JOHNSON - - - - *Petitioner*
*v.*HENRY MEIGS, Judge, Franklin Circuit Court - *Respondent*

On Petition for Writ of Prohibition

**ORDER DENYING MOTION FOR WRIT
 OF PROHIBITION**

BEFORE: MARTIN, Chief Judge, REYNOLDS and WILHOIT,
 Judges.

The Court, having considered this original action styled
 Motion for Writ of Prohibition, and the response thereto,
 and being otherwise sufficiently advised, ORDERS that the
 motion be and is hereby DENIED.

ENTERED: February 23, 1978.

/s/ Boyce F. Martin
 Judge, Court of Appeals

KENTUCKY REVISED STATUTES

502.020 Liability for conduct of another; complicity

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or

(c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

(2) When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he:

(a) Solicits or engages in a conspiracy with another person to engage in the conduct causing such result; or

(b) Aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result; or

(c) Having a legal duty to prevent the conduct causing the result, fails to make a proper effort to do so.

HISTORY: 1974 H 232, § 21, eff. 1-1-75

505.040 Effect of former prosecution for different offense

Although a prosecution is for a violation of a different statutory provision from a former prosecution or for a violation of the same provision but based on different facts, it is barred by the former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal, a conviction which has not subsequently been set aside, or a determination that there was insufficient evidence to

warrant a conviction, and the subsequent prosecution is for:

(a) An offense of which the defendant could have been convicted at the first prosecution; or

(b) An offense involving the same conduct as the first prosecution, unless each prosecution requires proof of a fact not required in the other prosecution or unless the offense was not consummated when the former prosecution began; or

(2) The former prosecution was terminated by a final order or judgment which has not subsequently been set aside and which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution; or

(3) The former prosecution was improperly terminated, as that term is used in subsection (4) of KRS 505.030, and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.

HISTORY: 1974 H 232, § 46, eff. 1-1-75

FRANKLIN CIRCUIT COURT INSTRUCTIONS

INSTRUCTION No. 1

(Murder)

You will find the defendant guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Franklin County, Kentucky, on or about the 22nd day of April, 1977, and before the finding of the indictment herein, David Ronzell Johnson voluntarily participated in promoting or facilitating the robbery of Long John Silver's Seafood Shoppe, 166 Versailles Road,

Frankfort, Kentucky, by aiding, counselling, or attempting to aid Dwight Hubert Davis;

(b) That during the course of this robbery and as a consequence thereof, Donald Botts was shot and killed;

AND

(c) That by so participating in that robbery, David Ronzell Johnson was wantonly engaging in conduct which created a grave risk of death to another and that he thereby caused Donald Bott's death under circumstances manifesting an extreme indifference to human life.

The term wantonly as used herein means a defendant acts wantonly with respect to another's death when he is aware of and consciously disregards a substantial and unjustifiable risk that death will occur. In order to be "substantial and unjustifiable" the risk of death must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than twenty (20) years or for life, in your discretion.

Unless you so believe, you will find the defendant not guilty.

INSTRUCTION No. 2 (Robbery)

You will find the defendant, David Ronzell Johnson, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in Franklin County, Kentucky, on or about the 22nd day of April, 1977, and before the finding of the indictment herein, Dwight Hubert Davis stole a sum of

money from Long John Silver's Seafood Shoppe, 166 Versailles Road, Frankfort, Kentucky;

(b) That in the course of so doing and with intent to accomplish the theft, Dwight Hubert Davis used physical force upon Donald Botts by shooting him with a dangerous instrument, to wit: a pistol;

AND

(c) That the defendant, David Ronzell Johnson, with the intention of promoting or facilitating the robbery aided, counseled, or attempted to aid Dwight Hubert Davis.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

Unless you so believe, you will find the defendant not guilty.

INSTRUCTION No. 3

An accomplice is one of two or more persons participating in the commission of a crime, either as a principal actor in its commission or one who is present or nearby and is assisting or encouraging or holding himself in readiness to assist in its commission. If you believe from the evidence that the witness Dwight Davis was an accomplice in the robbery of Long John Silvers Seafood Shoppe or the death of Donald Botts, then you cannot convict the defendant, David Ronzell Johnson, of either offense, on the basis of the testimony of Dwight Davis unless it is supported by other evidence tending to connect the defendant with the commission of the offense in question, and such other evidence is not sufficient for that purpose if it merely shows that such offense was committed by someone and the circumstances under which it was committed. The question of whether the witness, Dwight Davis, was an accomplice is for the jury to determine from the evidence.

INSTRUCTION No. 4

If upon the whole case you have a reasonable doubt as to the defendant's guilt under Instruction No. 1 you shall find him not guilty. The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved, but whether, after hearing all the evidence, you actually doubt that the defendant is guilty.

If upon the whole case you have a reasonable doubt as to the defendant's guilt under Instruction No. 2 you shall find him not guilty. The term "reasonable doubt" as used in these instructions means a substantial doubt, a real doubt, in that you must ask yourself not whether a better case might have been proved, but whether, after hearing all the evidence, you actually doubt that the defendant is guilty.

INSTRUCTION No. 5

The verdict of the jury must be unanimous and be signed by one of you as foreman.

You may use one of the forms provided at the end of these instructions in writing your verdict.